Supreme Court, U.S.
FILED
AUG 30 1971
E. ROBERT SEAVER, CLERK

RECEIVED
AUG 30 1971
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-301

HARVEY FRANKLIN and
MICHAEL FREDERICK DENT,

Petitioners.

v.

STATE OF NEW JERSEY.

PETITION FOR A WRIT OF CERTIORARI
TO THE NEW JERSEY SUPERIOR COURT
APPELLATE DIVISION

STEPHEN N. MASKALERIS, ESQ.
Counsel for Petitioner
744 Broad Street
Newark, N.J. 07102
(201) 624-9583

Joseph A. Vena, Esq.
Of Counsel

INDEX

	Page
Opinions Below.	1
Jurisdiction.	2
Questions Presented	2
Constitutional Provisions Involved.	2
Statement of Facts.	2
Reasons for Granting the Writ	5
Conclusion.	16
Appendix A (Opinion of Superior Court of New Jersey, Appellate Division).	17-21
Appendix B (Opinion of Supreme Court of New Jersey).	22

CASE CITATIONS

Altomare v. Cesaro, 70 N.J.Super.54, 174 A.2d 754 (App.Div. 1961). 12

Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964) 7

Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed. 2d 1178 (1967) . . . . . 6,7,8,9,12,15.

Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d, 882 (1966). 8

Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964) 14

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966) . 8,9.

Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed. 2d 678 (1964). 14

Palmer v. Peyton, 359 F.2d 199 (4 Cir. 1966). . 10

Rich v. Cooper, 380 P.2d 613 (Or.). 12

Richardson v. State, 90 Md. 109, 44 A. 999 (1899). 14

Page

Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908. 15

Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) 10

State v. Fioravanti, 46 N.J. 109, 214 A.2d 16 (1965) 15

State v. King, 44 N.J. 346, 209 A.2d 110 (1965) 16

State v. Simmons, 52 N.J. 538, 247 A.2d 313 (1968) 9

State v. Thomas, 105 N.J. Super. 331, 757 A.2d 377 (App. Div. 1969). 6

State v. Thomas, 107 N.J. Super. 128, 257 A.2d 377 (App. Div. 1969). 6

State v. Travis, 49 N.J. 428, 231 A.2d 205 (1967) 9

Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) . . . . . 6,7,8,10.

United States ex rel Fioravanti v. Yeager, 404 F.2d 675 (1968). 15

United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 16 L.Ed.2d 1149 (1967) . . . . . 5,6,7,8,9, 11,15.

United States ex rel Mitchell v. Pinto, 438 F.2d 814 (1971). . . . . 15,16.

Venuto v. Lubik Oldsmobile, Inc., 70 N.J. Super. 221, 175 A.2d 477 (App. Div. 1961). . 17

U.S. CONSTITUTION

Amendment V. 16

Amendment VI 16

Amendment XIV. . . . . 11,16.

OTHER AUTHORITIES

American Jurisprudence, Proof of Facts 13

American Law Reports, 2d Series. . . . . 13,14.

Page

American Law Reports, 3d Series. 6

Corpus Juris Secundum. . . . . 6,11,12,13.

Lawyer's Edition. U.S. Supreme Court Reports . . 6

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO.

HARVEY FRANKLIN and
MICHAEL FREDERICK DENT,

Petitioners.

v.

STATE OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI
TO THE NEW JERSEY SUPERIOR COURT
APPELLATE DIVISION

The petitioners, HARVEY FRANKLIN and MICHAEL FREDERICK DENT, pray that a writ of certiorari issue to review the opinion and judgment of the New Jersey Superior Court, Appellate Division, rendered in these proceedings on March 29, 1971.

OPINIONS BELOW

The opinion of the New Jersey Superior Court, Appellate Division, as yet unreported, appears at Appendix A, infra, pp.17-21 . The Supreme Court of New Jersey denied the petition for certification without opinion. (Appendix B, infra, p. 22)

JURISDICTION

The order or judgment of the Supreme Court of New Jersey was entered on June 1, 1971. See Appendix B, p. 22, infra. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Whether the identification proceedings followed were in violation of the defendants' constitutional rights, thereby rendering the evidence based thereon inadmissible.

2. Whether the trial court's refusal to permit defendants to model stocking masks before the jury constituted reversible error.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Constitution of the United States, Amendment V.
2. Constitution of the United States, Amendment VI.
3. Constitution of the United States, Amendment XIV.

STATEMENT OF FACTS

On August 8, 1966, at 2:30 a.m., Donato Capozzelli and his wife, Margaret, were awakened in their bedroom by 3 or 4 intruders. At least two men were armed and two wore stockings covering their heads and faces during the entire episode. One intruder removed his stocking, giving Mrs. Capozzelli a clear view of his face. Both Mr. and Mrs. Capozzelli wore glasses but not during the episode in question. Blankets were pulled over their heads and they had no recollection of what clothes

the intruders were wearing, except for a pair of yellow gloves.

After one-half hour, the intruders left and several hours later, police were called at about 7:00 a.m. Money and personal property were taken.

The following afternoon, 14 hours later, Mr. and Mrs. Capozzelli were shown photographs at the police station and Mr. Capozzelli identified one as Defendant Dent. After consultation with Mrs. Capozzelli, he identified another as Defendant Franklin.

During the afternoon of August 9th, approximately 36 hours after the crime, Mr. and Mrs. Capozzelli returned to police headquarters. Mr. Capozzelli was first shown a "little man" in a small room, whom he was not able to identify. He was then taken downstairs, where he was directed to look through a one-way mirror into a room occupied by two men, whom he identified as the Defendants. When Mrs. Capozzelli was shown the "little man" in the room upstairs, she recognized him as a young man from the neighborhood whom she had seen on many occasions. She realized that he had been the one of the intruders who had removed his stocking mask. Although she had seen him many times before and although he had not worn his mask during the entire episode, she had not recognized him for certain when she saw him in her house, and she did not tell the police who he was until after she had seen him at the police station. When she observed the other two men in the room downstairs through a one-way mirror, she identified them as the Defendants. The Defendants were not yet represented by counsel and no ; counsel was present during the entire out-of-court identification procedure.

The Capozzellis had not seen the Defendants in the neigh-

borhood or elsewhere prior to the episode and did not know them. They were not shown any other persons. They were not shown the Defendants, or anyone else, wearing stockings over their faces.

Mr. and Mrs. Capozzelli also identified Defendants in Court and Mr. Capozzelli testified that he could so identify them on the basis of his observations of the intruders in his home three years earlier, and without relying upon his out-of-court identifications from photographs and from his observation of Defendants at the police station. They testified that the appearance of the Defendants was similar to that at the time of the robbery, except for the fact that Defendant Franklin wore his hair differently and wore glasses at the trial. Police witnesses gave corroborating testimony regarding the appearance of the Defendants.

On August 23, 1966, Defendants Harvey Franklin and Michael Frederick Dent were indicted by the Union County Grand Jury for robbery in violation of N.J.S.A. 2A:141-1. Count 2 of the same indictment charged Defendant Dent with being armed during the commission of said robbery, in violation of N.J.S.A. 2A:151-5. On April 2, 1969, after a trial in the Superior Court, Law Division, Union County, before a jury, Hon. John E. Barger presiding, Defendant Franklin was convicted on Count I and Defendant Dent was convicted on Counts I and II. On April 18, 1969, Defendant Franklin was sentenced to 12 to 15 years in State Prison, with credit for 274 days spent in jail. On the same date, Defendant Dent was sentenced to 12 to 15 years in State Prison on Count I, and 2 to 3 years in State Prison on Count II, the sentences to be served consecutively, with credit for 255 days spent in jail.

Judgments were filed on April 22 and April 24, 1969. A Notice of Appeal from the judgments was filed on July 17, 1969.

The points raised in this Appeal were:

A. The identification procedures followed were in violation of Defendants' constitutional rights and evidence based thereon was inadmissible;

B. The trial court's refusal to permit Defendants to model stocking masks before the jury constituted reversible error;

C. The State failed to prove possession by Defendants of stolen property or the instrumentalities of crime;

D. The trial court's instructions on possession and the inferences arising therefrom were erroneous under the circumstances and prjudicial to defendants.

On March 29, 1971, the Superior Court of New Jersey, Appellate Division, affirmed the convictions.

On June 1, 1971, the Supreme Court of New Jersey denied the Defendants' petition for certification.

REASONS FOR GRANTING THE WRIT

1. The out-of-court confrontations constituted a critical stage of the proceedings against Defendants at which Defendants were entitled to the assistance of counsel.

An out-of-court confrontation, between a witness and an accused, for purposes of identification, is fraught with dangers and possibilities of improper suggestion and constitutes a "critical stage" of the proceedings against a Defendant and one at which he is entitled to be represented by counsel. United

States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 16 L.Ed. 2d 1149 (1967); Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed. 2d 1178 (1967). And see 23 C.J.S. 936, n. 11 (pocket supplement), Criminal Law Sec. 979; Annotation: 18 L.Ed. 2d 1420, 1426 et seq; Annotation: 24 A.L.R. 3d 1261, 1277 et seq. Evidence regarding out-of-court identifications effected in violation of a Defendant's right to counsel is inadmissible at trial. Gilbert v. California, supra. It is not relevant whether the confrontation involves a lineup or other procedure (see Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed. 2d 1199 (1967)), or whether the confrontation occurs prior to or following indictment (see Stovall v. Denno, supra; cf. State v. Thomas, 107 N.J. Super. 128, 257 A.2d 377 (App. Div. 1969)). The only apparent qualification of the otherwise absolute right to counsel exists where the confrontation occurs in such temporal or spatial proximity to the crime that it is tantamount to an "on-the-spot" identification. State v. Thomas, supra.

An examination of Stovall v. Denno, supra, reveals that the case arose out of a petition for habeas corpus, that the confrontation in question and the trial had occurred long prior to the Wade and Gilbert decisions, and that the time for appeal had also long past. It is the fact that the case was presented as one for post-conviction relief, rather than as an ordinary appeal, which was in fact the sole operative factor distinguishing Stovall from Wade and Gilbert. All three decisions were handed down on the same date, June 12, 1967. Regardless of the particular language used by the court in denying retroactivity, it is beyond question that had Stovall been under consideration on appeal rather than on habeas corpus, the court could not rationally

have reached a different result than in Wade and Gilbert.

The distinctions between Stovall and the case at bar are evident. In the instant case, only the confrontation occurred prior to June 12, 1967. The trial of this case began nearly two years later, at a time when the Wade and Gilbert rules had become firmly established. They were exhaustively discussed by trial counsel and the trial judge, who held that applying them would constitute "retroactive application" contrary to the holding in Stovall. The result was that, in the good faith belief that the new rules did not apply, the trial judge forced himself to make evidentiary rulings which, at the time, he knew were not consonant with the current constitutional rules of evidence. This was improper and not dictated by the narrow holding in Stovall.

The difficulty with Stovall is that it misleadingly suggests that, in the case of a constitutional rule of evidence, either it is "retroactive" or it is "prospective only". The practical problem is that, at the time a new rule of criminal procedure is announced, criminal matters which may be affected by the new holding are at many stages: at one extreme, the crime out of which such issue may subsequently arise has not yet been committed, which clearly involves no problem of retroactivity; at the other extreme, that presented in Stovall, the crime has occurred, as have the investigation, trial and appeal, and the case is closed, which equally clearly does involve retroactivity. Whether "retroactive application" is involved in applying the new decision to cases in intervening stages is not so obvious.

The cases of Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct.

1758, 12 L.Ed.2d 977 (1964), and Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966), established constitutional rules of criminal procedure involving the pre-trial right to counsel analogous to those enunciated in Wade and Gilbert, supra. In Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966), as in Stovall, supra, a proceeding was brought to obtain post-conviction relief in a case long closed on the basis of a denial of counsel under the rules laid down in Escobedo and Miranda. The court, as in Stovall, refused to grant the relief on the ground that the holdings in Escobedo and Miranda were not to be applied retroactively. The court stressed the fact the decisions prior to Escobedo and Miranda did not foreshadow the new rules, that there had been fair reliance on the former procedures by law enforcement agencies, and that retroactive application would seriously disrupt the administration of criminal laws by requiring retrial or release of persons found guilty in accordance with previously acceptable standards, all of which were also urged in the instant case (with the distinction, of course, that these Defendants were not tried or convicted on the basis of standards acceptable at the time of trial.) The court held that, in fairness to enforcement agencies and trial courts, the standards laid down in Escobedo and Miranda would be applicable only to those cases in which the trial began after those decisions were announced; this was said to constitute non-retroactive application.

Following the Johnson decision, the Supreme Court of New Jersey affirmed per curiam a Superior Court decision sustaining a motion to suppress statements made by a Defendant in a situ-

ation where Miranda warnings had not been given, holding the Miranda rule applicable to a case where the trial had not begun as of the date of the decision, even though the statements were obtained prior to that date. State v. Travis, 49 N.J. 428, 231 A.2d 205 (1967). There is no reason not to apply this rationale to the case at bar.

In the most recent pronouncement of the New Jersey Supreme Court on this issue, the per curiam decision in State v. Simmons, 52 N.J. 538, 247 A.2d 313 (1968), the court held Wade and Gilbert inapplicable "for they were handed down after the defendant's trial and convictions and admittedly they have no retroactive effect." 52 N.J., at page 542, emphasis added. This statement implies that in the converse situation present in the instant case, the Wade-Gilbert rules do apply.

Defendants therefore conclude that since the out-of-court confrontations in this case did not comply with the standards laid down in the Wade and Gilbert cases, all evidence concerning such confrontations should have been excluded from consideration at their trial. Conducting a trial under rules of constitutional procedure known to have been superseded for nearly two years is not required by the applicable case law and should not be done.

2. Under the totality of the circumstances, the out-of-court confrontations were fundamentally unfair and violative of Defendants' rights to due process of law.

A fundamentally unfair atmosphere of suggestibility surrounded the out-of-court confrontations in order to culminate in the Defendants' identification by the witnesses. Where a confron-

tation is, under the totality of the circumstances, so suggestive that it is conducive to an irreparable mistaken identification, it constitutes a denial of due process rights guaranteed by the Fourteenth Amendment. Stovall v. Denno, supra; see also Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); Palmer v. Peyton, 359 F.2d 199 (4 Cir. 1966);

In Palmer v. Peyton, supra, the court held that a procedure in which the police secured the identification of defendant's voice by the prosecuting witness, without permitting them to confront each other and without giving the witness an opportunity to compare the defendant's voice with others, violated due process. The court said (359 F.2d., at page 202):

> ". . . at this most critical point in the proceedings against him--the voice identification--[defendant] was deprived of the most elementary safeguards of the law. In their understandable zeal to secure an identification, the police simply destroyed the possibility of an objective, impartial judgment by the prosecutrix as to whether [defendant's] voice was in fact that of the man who had attacked her. Such a procedure fails to meet 'those canons of decency and fairness' established as part of the fundamental law of the land. A state may not rely in a criminal prosecution upon evidence secured by pumping a man's stomach, by breaking into his home, or by employing subtle psychological methods on him, nor may it rely on an identification secured by a process in which the search for truth is made secondary to the quest for a conviction." (Emphasis added.)

Because of the particular circumstances in the case at bar: that the police knew identification would be difficult because of the masks, racial difference and confusion of the witness; that there was no exigency justifying their failure to take precautions against a misidentification; and that the circum-

stances of presenting two persons, obviously in custody, was in itself obviously suggestive; Defendants contend that the out-of-court confrontation procedure in which they were identified by the Capozzellis violated their right to due process of law under the Fourteenth Amendment.

3. The State did not sustain its burden of establishing that the in-court identifications were not tainted by the infirmities of the out-of-court procedures.

> "The testimony of a witness identifying accused is not admissible if it is tainted by an illegal identification in which accused was deprived of his constitutional rights, but the fact that there was such a previous identification does not render inadmissible an in-court identification which is based on an independent origin or source. The proper test in determining whether an in-court identication was based on an observation of accused other than the illegal identification is whether the in-court identification was the result of that illegaility or resulted from means sufficiently distinguishable to be purged of the taint." 22A C.J.S. Pocket Supplement 63, Criminal Law Sec. 616, and cases cited. (Emphasis added.)

In United States v. Wade, supra, the identifying witnesses made in-court identifications on direct examination; the existence of prior out-of-court identifications was elicited on cross. The Supreme Court held that where an in-court identification was based upon an illegal out-of-court confrontation, a rule limiting exclusion to the out-of-court confrontation would render the right to counsel at such confrontation an empty one. It adopted the rule that unless the government can establish by clear and convincing evidence that the in-court identifications were based on observations of the Defendant other than at the illegal confrontation, such in-court identifications are also inadmissible.

Similarly, in Gilbert v. California, supra, it was held that in-court identifications are rendered inadmissible by illegal out-of-court confrontations, unless the State can establish an indipendent source to purge them of their taint.

4. Modeling of the masks constituted relevant demonstrative evidence for which a proper foundation had been laid and excluding it constituted error.

> "Demonstrative or real evidence, or evidence by inspection, is such evidence as is addressed directly to the senses of the court or jury without the intervention of the testimony of witnesses, as where various things are exhibited in open court. Such evidence is generally considered to be a very satisfactory or convincing class of evidence, and to be more satisfactory than mere verbal descriptions of objects by witnesses who have inspected them outside of court." 32 C.J.S. 757, Evidence Sec. 601, and cases collected in nn. 99 et seq.

It is largely within the discretion of the trial court to determine the admissibility of such evidence, based upon its determination of relevancy and value, and based upon the laying of a proper foundation resting upon satisfactory identification and a showing that no substantial change has taken place as would render the evidence misleading. See 32 C.J.S. 758 et seq, Evidence Secs. 602, 607; Altomare v. Cesaro, 70 N.J. Super. 54, 174 A.2d 754 (App. Div. 1961); Venuto v. Lubik Oldsmobile, Inc., 70 N.J. Super. 221, 175 A.2d 477 (App. Div. 1961). However, demonstrative or inspection evidence should not be arbitrarily excluded and if it is material and relevant, must be received unless there is some reason for excluding it. 32 C.J.S. 758, Evidence Sec. 602, citing Rich v. Cooper, 380 P.2d 613 (Or.).

In the case at bar, there has been no suggestion that the modeling of the masks lacked relevancy or probative value; the trial court agreed that such was the case, at least impliedly, by agreeing to admit such evidence upon two conditions, both of which were erroneous and constituted an abuse of discretion. The first of these conditions was that the Defendants get on the witness stand and lay a foundation for the evidence by testifying to the fact that there was no substantial difference in their appearance at the time of the offense and at the time of the demonstration. Defendants concede that requiring such a foundation was proper, but Defendants argue that it was in fact laid and that there was no justification for the position that it had to be laid by means of testimony by the Defendants themselves.

The type of evidence here involved is somewhat analogous to performing an experiment out of court and testifying to the results in court, with the exception that the demonstrative in-court evidence is more reliable because it is presented directly to the jury without passing through the intermediary prism of a witness' perceptions. Experimental evidence tending to establish visibility is admissible, where such evidence is relevant and the conditions surrounding the experiment are substantially similar to those prevailing at the time of the event in issue. See Annotation: 78 A.L.R.2d 152; see also 32 C.J.S. 719 et seq, Evidence Sec. 588 (1), and cases collected in n. 59; Id., Evidence Sec. 590; 20 Am. Jur. P.O.F.554. Most criminal cases in which such experiments are offered involve attempts to impeach

or corroborate the testimony of eye witnesses to a crime or their identification of persons participating therein. 78 A.L.R.2d 152, 159.

In Richardson v. State, 90 Md. 109, 44 A. 999(1899), a conviction for assault with intent to kill was reversed on the ground that the trial court had erroneously excluded testimony, concerning an experiment,which tended to impeach an eyewitness identification.

Defendants' demonstrative evidence would have tended to impeach the eyewitnesses' identification of them. Such evidence was admittedly relevant and proper foundation was laid for it; hence, its exclusion was erroneous.

5. Presentation of demonstrative evidence would not have constituted a waiver of Defendants' privilege against self-incrimination and exposed them to cross-examination.

The Fifth Amendment privilege against self-incrimination is made applicable to the states through the Fourteenth Amendment, and the same standards determine whether the silence of an accused is justified whether federal or state proceedings are involved. Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed. 2d 678 (1964), citing Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

It is generally established that the privilege against self-incrimination is a protection only against compelled testimonial utterances and that a person may be compelled to give evidence of a non-testimonial nature without violating his

privilege; such evidence may include the performance of examinations and tests upon his body, analysis of blood, hair, nails, fingerprints, footprints, etc., and may also include requirements that he sit, stand, walk, model clothing and masks, demonstrate his voice or handwriting and perform a wide range of other acts, in and out of court, for purposes of identification or other evidentiary purposes. United States v. Wade, supra, citing Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 2d 908; Gilbert v. California, supra.

There is no question but that, had the State desired to compel Defendants to model the stocking masks before the jury, it could have done so without violating their privilege against self-incrimination. See, eg., State v. King, 44 N.J. 572, 209 A.2d 110 (1965).

The same is likewise true as to a defendant instituting a demonstration without testimonial utterances.

In the recent case of United States ex rel Mitchell v. Pinto, 438 F.2d 814, (3rd. Circuit, 1971),decided February 3, 1971, the Court said:

> "In State v. Fioravanti, 1965, 46 N.J. 109, 215 A.2d 16, the Supreme Court of New Jersey reasoned that by engaging in a courtroom demonstration an accused implicitly asserts that such variable conditions as height, weight, and hair style have not changed since the date of the crime. But the jury may find the demonstration probative without any such assurance from the demonstrator. Moreover, if an accused, by merely engaging in a courtroom demonstration, is said to testify that his appearance has remained unchanged, then he is likewise forced to testify concerning the constancy of his appearance when he is compelled by the state to make such a demonstration. But such is not the case. See Wade, Schmerber, Holt, supra. The defendant does not testify in either situation. The constancy of his appearance is an inference

> which the jury may or may not draw from the introduction of the physical evidence itself and is as readily drawn when the presentation of this evidence is by the prosecution as when it is by the defense. In addition, this inference can be rebutted specifically by evidence of a change in the defendant's appearance or by argument during summation. . . . .
>
> It must be recognized that the foregoing analysis and the conclusion to which it leads seem to contradict the rationale of this court's recent per curiam opinion in United States ex rel. Fioravanti v. Yeager, 1968, 404 F.2d 675. To the extent of such inconsistency, the reasoning of the Fioravanti opinion will not be followed." (Underlining ours).

United States ex rel. Mitchell v. Pinto, supra, clearly states that the demonstration attempted by the Defendants did not consist of a testimonial assertion. The Defendants did not testify and it is therefore not inconsistent to their refusal to take the stand and be cross-examined.

The Mitchell case which was decided by the United States Court of Appeals, Third Circuit on February 3, 1971 overruled the entire rationale of the 1965 New Jersey Supreme Court decision in the Fioravanti case, the case upon which the New Jersey Superior Court, Appellate Division based its decision, which decision was thereafter denied certification by the New Jersey Superior Court.

While the instant case was argued and decided by the Superior Court, Appellate Division, after the third circuit decision in the Mitchell case, neither the Appellate Division nor the Supreme Court of New Jersey considered or applied this decision to the instant case and consequently committed clear error in so doing in that both of these Courts relied upon the decision of a case that had been overruled.

CONCLUSION

For the reasons stated which clearly show the Defendants were deprived of their rights guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and by reason of the error of the New Jersey Courts, a Writ of Certiorari should issue to review the judgment and opinion of the New Jersey Superior Court, Appellate Division.

Respectfully submitted,

STEPHEN N. MASKALERIS
Counsel for Petitioners
744 Broad Street
Newark, New Jersey 07102

Dated: August 27, 1971

APPENDIX A

[Here is set forth the opinion rendered in the Superior Court of New Jersey, Appellate Division]

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1805-68

STATE OF NEW JERSEY,

Plaintiff-Respondent

v.

HARVEY FRANKLIN and MICHAEL FREDERICK DENT,

Defendants-Appellants

MAR 29 1971

Argued March 15, 1971 - Decided

Before Judges Sullivan, Collester and Labrecque.

On appeal from the Superior Court of New Jersey, Law Division, Union County.

Mr. William R. Gilson, Assigned Counsel, argued the cause for appellants (Molly E. Cohen, of the California Bar, on the brief; Messrs. Kentz & Gilson, attorneys).

Mr. Elson P. Kendall, Assistant Prosecutor, argued the cause for respondent (Mr. Arthur J. Timins, Assistant Prosecutor, on the brief; Mr. Karl Asch, Union County Prosecutor, attorney).

PER CURIAM

After a jury trial, defendants were convicted of robbery. In addition, defendant Dent was found guilty of having committed the robbery while armed. Each was sentenced to 12-to-15 years in State Prison for the robbery. Dent received an additional consecutive term of 2-to-3 years for being armed. This was not defendants' first brush with the law. See: State v. Dent, State v. Franklin, 51 N.J. 428 (1968).

About 2:30 in the morning of August 8, 1966 Mr. and Mrs. Capozzelli were awakened by three or four intruders who had entered their bedroom. Mr. Capozzelli recalled that he woke up when the bedroom lights were turned on and one of the visitors announced that "this is a stickup." Although the Capozzellis were initially forced to cover their heads with the blankets, they were shortly permitted to emerge when Mr. Capozzelli had trouble breathing. Each of the young men had a stocking over his head; two of them, brandishing guns, stationed themselves on either side of the bed while another ransacked the bedroom and adjoining rooms in search of valuables. Mr. Capozzelli had a good opportunity to study the man on his side of the bed at close range during the entire episode, which lasted for 20 or 30 minutes. Notwithstanding the presence of the stocking over this man's face, Mr. Capozzelli testified that he was able to discern the man's features. Mr. Capozzelli testified that he could also identify the man who had positioned himself next to Mrs. Capozzelli. After the visitors had departed, the Capozzellis waited until about 7 A.M. before calling the police for fear that the culprits might still be lurking in or near the house. Mrs. Capozzelli's testimony was essentially the same as her husband's.

On the afternoon of August 8, the Capozzellis selected pictures of Franklin and Dent from photographs of "eight or ten" persons shown to them by the police. On the following day, the Capozzellis identified Franklin and Dent through a one-way mirror. They also identified one John Davis, Jr., the son of a neighbor, as the third culprit who had rummaged while Franklin and Dent held them at bay.

Police later executed a search warrant at the Davis home, and discovered, inter alia, stockings, a gun, and various items of

personalty which had been taken from the Capozzellis. Franklin and Dent were identified as being in the Davis home later in the same day the robbery was committed.

Although other questions are raised, the central issue is the constitutionality of defendants' out-of-court and subsequent in-court identification by their victims.

Defendants argue that (1) they were entitled to the assistance of counsel at the out-of-court photographic and face-to-face identification; (2) in any event, the out-of-court identification procedures were so impermissibly suggestive as to violate due process; and (3) the State failed to sustain the burden of proving that the in-court identifications were not "tainted" by the infirmities of the extrajudicial procedures.

We find these contentions to lack merit.

First, there existed no right to counsel at extrajudicial confrontations in August 1966--i.e., Wade is not retroactive. Stovall v. Denno, 388 U.S. 293 (1968); State v. Mustacchio, 57 N.J. 265, 269-71 (1970).

Second, the photographic and face-to-face identifications were not "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U. S. 377, 384 (1967). Neither photographic nor "one-to-one" confrontations are per se invalid. State v. Mustacchio, supra, at 274. Indeed, as to the latter, the absence of comparison ordinarily goes only to the weight of the evidence and not to its admissibility. State v. Thomas, 107 N.J.Super. 128, 132 (App. Div. 1969). The police here did absolutely nothing in either instance to suggest the identity of the culprits or otherwise to give rise to the possibility of misidentification. The Capozzellis had an ample opportunity to view the intruders for a

substantial period during the commission of the crime; the room was well lighted throughout the ordeal; and both Franklin and Dent were at close range.

Counsel stresses that the culprits had been masked and that the Capozzellis were terrified while the crime was being committed. But such factors go not to the constitutionality of the pretrial identification procedures but rather to the credibility of the identification testimony. We see no due process violation here.

Third, since the pretrial identification procedures were valid, there can be no "taint" of the subsequent in-court identification.

Franklin and Dent chose not to take the stand and called no witnesses in their behalf. However, at the close of all evidence they sought to model stocking masks in the presence of the jury, ostensibly in order to impeach the Capozzellis' identifications of them. Judge Barger disallowed the demonstration, essentially because such a demonstration, which is testimonial in nature, would be inconsistent with defendants' refusal to take the stand and be subjected to cross-examination. Judge Barger relied on State v. Fioravanti, 46 N.J. 109 (1965), which indicated that such demonstrations, when initiated by the defendant, are testimonial in character, and are meaningless when the defendant fails to take the stand and testify concerning his variable physical characteristics. So here, modeling of the stockings, of itself, would have had little probative value in impeaching the identifications. We see no abuse of discretion.

Finally, it is argued that there was insufficient evidence of defendants' possession of the stolen property, and that the trial

judge erroneously charged the jury on the subject of possession. Not so. Defendants were identified as the robbers. They need not have had actual possession of the property to be guilty of the offense, since they are principals in its commission. And, the court's charge on "joint possession" was entirely correct, though unnecessary.

Affirmed.

A TRUE COPY

APPENDIX B

[Here is set forth the opinion of the Supreme Court of New Jersey on Petition for Certification]

TRUE COPY

JUN 3 '71

SUPREME COURT OF NEW JERSEY
C-486 September Term 1970

State of New Jersey,

Plaintiff-Respondent,

vs.

Harvey Franklin and Michael Frederick Dent,

Defendants-Petitioners.

On Petition for Certification

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 1st day of June, 1971.

FILED
JUN 1 1971
CLERK

Acting
Clerk of the Supreme Court

SUPREME COURT OF THE UNITED STATES

HARVEY FRANKLIN and MICHAEL FREDERICK DENT, Petitioners,	)	CERTIFICATE OF SERVICE OF PETITION FOR A WRIT OF CERTIORARI
v.	)	
STATE OF NEW JERSEY	)	

I, Stephen N. Maskaleris, Attorney for the Petitioners in the above entitled action, hereby certify that:

(1) On August 27, 1971, I served the attached Petition for a Writ of Certiorari on the Attorney General of New Jersey, by depositing a copy in the United States mails, prepaid, Certified Mail, Return Receipt Requested, No. 891968, addressed to him at State House Annex, Trenton, New Jersey 08625; and,

(2) On August 27, 1971, I served the attached Petition for a Writ of Certiorari on the Prosecutor of Union County, State of New Jersey, by depositing a copy in the United States mails, prepaid, Certified Mail, Return Receipt Requested, No. 891969, addressed to him at Court House, Elizabeth, New Jersey 07207;

pursuant to Rule 33 (3)(b) of the Supreme Court Rules.

STEPHEN N. MASKALERIS, Esq.
Counsel for Petitioner
744 Broad Street
Newark, N.J. 07102

Dated: August 27, 1971

SUPREME COURT OF THE UNITED STATES

HARVEY FRANKLIN and MICHAEL FREDERICK DENT, Petitioners,	)	APPEARANCE
v.	)	
STATE OF NEW JERSEY	)	

To the Clerk of SUPREME COURT OF THE UNITED STATES:

Please enter my appearance as Attorney for Petitioners, Harvey Franklin and Michael Frederick Dent, in the above entitled action.

STEPHEN N. MASKALERIS, ESQ.
Counsel for Petitioners
744 Broad Street
Newark, N.J. 07102

Dated: August 27, 1971

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 7 1971
SEAVER, CLER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-301

HARVEY FRANKLIN and MICHAEL DENT,

Petitioners,

v.

THE STATE OF NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF FOR THE STATE OF NEW JERSEY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KARL ASCH
Union County Prosecutor
Attorney for Respondent
Union County Court House
Elizabeth, New Jersey 07207

ELSON P. KENDALL
Assistant Prosecutor
On the Brief

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
COUNTER-STATEMENT OF FACTS	2
ARGUMENT:	
Point I—Wade and Gilbert are not to be given retroactive effect	2
Point II—The identifications of the petitioners were fair in all respects	3
Point III—The trial court did not abuse its discretion in refusing to allow the demonstration	5
CONCLUSION	7

Cases Cited

Chapman v. California, 386 U.S. 18, reh. denied 386 U.S. 987 (1967)	6
Foster v. California, 394 U.S. 440 (1969)	2-4
Gilbert v. California, 388 U.S. 263 (1967)	2, 3
Gryger v. Burke, 334 U.S. 728, reh. denied 335 U.S. 837 (1948)	6
Herb v. Pitcairn, 324 U.S. 117 (1945)	6
Simmons v. United States, 390 U.S. 377 (1968)	3-5
State v. Mustacchio, 57 N.J. 265, 271 A. 2d 582 (1970)	2, 3
State v. Thomas, 107 N.J. Super. 128, 257 A. 2d 377 (App. Div. 1969)	5

PAGE

Stovall v. Denno, 388 U.S. 293 (1967) 2, 3

United States ex rel Mitchell and Pinto, 438 F. 2d 814 (3d Cir. 1971), cert. denied —— U.S. ——, 29 L. Ed. 2d 124 (1971) 6

United States v. Shannon, 424 F. 2d 476 (3d Cir. 1970) 4, 5

United States v. Wade, 388 U.S. 263 (1967) 2-4

United States ex rel Williams v. La Vallee, 415 F. 2d 643 (2d Cir. 1969), cert. denied sub nom. Williams v. Follette, 397 U.S. 997 (1970) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-301

HARVEY FRANKLIN and MICHAEL DENT,

Petitioners,

v.

THE STATE OF NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF FOR THE STATE OF NEW JERSEY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinion Below

The Opinion of the New Jersey Appellate Division, Docket No. A-1805-68, decided March 29, 1971, is unreported. The denial of certification by the New Jersey Su-

preme Court is reported at 58 N. J. 437, —— A. 2d —— (1971).

Counter-Statement of Facts

Petitioners were convicted of the armed robbery of Mr. and Mrs. Capozzelli at the Capozzelli's home in the early hours of the morning of August 8, 1966. The facts as set forth in the Opinion of the New Jersey Appellate Division show that the Capozzelli's had good opportunity to observe the defendants at close range for approximately twenty to thirty minutes. The Capozzelli's also identified the defendants from photographs of eight or ten persons shown to them at the police station less than fourteen hours after the robbery. On the following afternoon they also identified the defendants who were positioned behind a one-way mirror.

ARGUMENT

POINT I

Wade and Gilbert are not to be given retroactive effect.

The viewing of the defendants in the instant case took place in August 1966. Thus the rulings of both *United States* v. *Wade,* 388 U. S. 218 (1967), and *Gilbert* v. *California,* 388 U. S. 263 (1967), which require exclusion of identification evidence obtained in the absence of counsel cannot be applied. *Foster* v. *California,* 394 U. S. 440, 442 (1969), and *Stovall* v. *Denno,* 388 U. S. 293, 296 (1967). This is especially true since the New Jersey courts refuse to apply *Wade, supra,* retroactively. *State* v. *Mustacchio,* 57 N. J. 265, 270, 271 A. 2d 582 584 (1970).

POINT II

The identifications of the petitioners were fair in all respects.

The rulings of both *Wade* and *Gilbert* were based on the premise that an improperly conducted identification might inherently suggest a certain suspect as the perpetrator of the crime to an identifying witness; and that once this identification was made it would be unlikely that the witness would ever retract it. *United States* v. *Wade*, 388 U. S. 218, 228, 229 (1967).

This premise also extends to photographic identification—as a witness may retain the memory of the photograph rather than actual person. *Simmons* v. *United States*, 390 U. S. 377, 383 (1968). Thus the questions presented in the instant case are whether the photographic identifications and confrontations conducted were "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to deny due process of law. This would be a recognized ground of attack upon the conviction independent of any right to counsel claim. *Stovall* v. *Denno*, 388 U. S. 293, 302 (1967).

The burden to show this is on the petitioners as the identification procedures here took place before the present constitutional rule came into effect. Thus petitioners must prove that the "totality of the circumstances" surrounding the identifications were so impermissibly suggestive as to give rise to a "very substantial likelihood of irreparable misidentification." *See Stovall* v. *Denno*, *supra*, at 302; *Foster* v. *California*, 394 U. S. 440, 442 (1969); *Simmons* v. *United States*, 390 U. S. 377, 384 (1968); and *State* v. *Mustacchio*, 57 N. J. 265, 272, 271 A. 2d 582, 585 (1970).

It is significant to state that the initial photo identification of the defendants took place shortly after the crime by witnesses who had good opportunity to observe the defendants at close range during the crime. Such circumstances have been held as significant factors in determining the overall fairness of identification procedures. *Wade, supra,* at 241 (prior opportunity to observe, discrepancies between description and actual person, identification of a different person, photo identification prior to any lineup, failure to identify on a prior occasion, lapse of time); *Simmons* v. *United States, supra,* at 385 (lapse of time, opportunity to observe, good lighting, number of photographs shown); and *United States* v. *Shannon,* 424 F. 2d 476, 477 (3d Cir. 1970) (good lighting, opportunity to observe at close range, lapse of time, positiveness of identification).

It is clear that in the case *sub judice,* no irregularities were made in the identification procedures. They were ultimately fair under all the circumstances for there had been no lack of opportunity to observe nor was there any uncertainty in the identifications. *But cf. Foster* v. *California,* 394 U. S. 440 (1969).

Here, the witnesses were shown a selection of photographs from which they picked the defendants. These particular photographs were not emphasized in any way. Such procedures are used "widely and effectively in criminal law enforcement, from the standpoint of both of apprehending offenders and of sparing innocent suspects the ignomity of arrest by allowing eye witnesses to exonerate them through scrutiny of photographs." *Simmons* v. *United States, supra,* at 384.

Once the witnesses made identification from the photographs it was next up to the police to arrest the suspects and present them at either a lineup or "show-up" so that

the witnesses might make a positive identification. This is especially true where the suspects are taken almost immediately after the robbery as

> ". . . not only is the probable accuracy of the identification much more likely, but . . . an immediate confrontation is desirable as it may lead to the immediate release of an innocent suspect and at the same time enable the police to resume the search for the fleeing culprit while the trail is still fresh. This need of the police to know as soon as possible whether they have the right man justifies the identification procedure used here." (all citations omitted). *United States ex rel. Williams* v. *La Vallee,* 415 F. 2d 643, 645 (2d Cir. 1969), *cert. denied sub nom. Williams* v. *Follette,* 397 U. S. 997 (1970). *See also United States* v. *Shannon, supra,* at 477; and *Simmons* v. *United States, supra,* at 385.

Furthermore, although the only suspects the witnesses viewed at the "show-up" were the defendants—the memory of the incident was still "fresh in their minds", thus supporting the reliability of the identification. *State* v. *Thomas,* 107 N. J. Super. 128, 133, 257 A. 2d 377, 379 (App. Div. 1969).

POINT III

The trial court did not abuse its discretion in refusing to allow the demonstration.

Petitioners concede that the admission of demonstrative evidence is within the discretion of the trial court, but argue that the failure of the trial court to allow the defendants to exhibit the stocking masks was arbitrary.

Such an argument raises no federal question but is merely a matter of state law and therefore should not be considered by this Court. *See Gryger* v. *Burke,* 334 U. S. 728, 731, *reh. denied* 335 U. S. 837 (1948). This is especially true as the function of this Court in reviewing judgments from State courts is only "to correct them to the extent that they incorrectly adjudge federal rights." *Herb* v. *Pitcairn,* 324 U. S. 117, 126 (1945).

Here the New Jersey Appellate Division found that the trial court refused to allow the demonstration on the basis of a lack of probative value in impeaching the identification. This was on the basis that such demonstrations are meaningless where the defendant fails to take the stand and testify concerning the variable physical characteristics. It was held that no abuse of discretion was made in the trial court.

Petitioners now seek to elevate this argument to federal dimensions by citing *United States ex rel. Mitchell* v. *Pinto,* 438 F. 2d 814 (3d Cir. 1971), *cert. denied* —— U. S. ——, 29 L. Ed. 2d 124 (1971). The fact that they cite a federal case does not mean they have raised a federal question. Moreover, that case is not binding on the New Jersey courts. Even if it were binding it could be easily distinguished in that *Pinto, supra,* deals entirely with the subject of "self-incrimination", whereas the question raised in the instant case deals only with the discretion of the trial court and an alleged abuse thereof. Thus it would not apply under any circumstances.

The State further submits that even if an abuse of discretion was found to have been made by the trial court—such would at most amount to "harmless error" and should thus be disregarded by any reviewing court. See *Chapman* v. *California,* 386 U. S. 18, 22. *reh. denied* 386 U. S. 987 (1967).

CONCLUSION

For the foregoing reasons it is respectfully requested that the Petition for Certiorari and all relief requested by the petitioners be denied.

Respectfully submitted,

KARL ASCH
Union County Prosecutor
By ELSON P. KENDALL
Assistant Prosecutor
Counsel for Respondent